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Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers.	)	CC Docket No. 92-26

To: The Commission

COMMENTS
OF MICHAEL J. HIRREL

I, Michael J. Hirrel, hereby file on my own behalf Comments in the above captioned proceeding. I am a member of the District of Columbia and Florida bars, and have practiced communications law continuously since 1977, primarily before the FCC. I have represented customers of common carriers in formal complaints concerning the carriers' rates or practices. I also represent common carriers who could become the targets of formal complaints. My interest in this proceeding, therefore, is not in favoring either carriers or customers, but in assuring that the process will achieve fair and justified results.

A. GENERAL CONSIDERATIONS.

The Notice of Proposed Rulemaking (the NPRM) emphasizes the Commission's desire to expedite resolution of formal complaints against common carriers. This is laudable goal. In seeking to achieve that goal, however, the Commission should remember that its fundamental responsibility under the

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Communications Act is to reach decisions which are substantively in the public interest. The Commission should not permit its legitimate desire for expedition to override proper discharge of this fundamental responsibility.

This has been the consistent holding of the courts of appeals. The courts have regularly held that expedition in reaching decisions is less important than reaching proper decisions and employing procedural mechanisms that will promote proper decisions. E.g. Aeronautical Radio, Inc. v. FCC, 928 F.2d 428, 452 (D.C. Cir. 1991); Kessler v. FCC, 326 F.2d 673, 687 (D.C. Cir. 1963); Community Broadcasting Co. v. FCC, 274 F.2d 753, 763 (D.C. Cir. 1960); Clarksburg Publishing Co. v. FCC, 225 F.2d 511, 522-23 (D.C. Cir. 1955).

Several of the NPRM's proposals would, if adopted, impair proper resolution of common carrier complaints. They would impose unreasonable deadlines on the parties, or they would deprive the parties of essential opportunities to make their cases. Unreasonable deadlines will require parties to submit inadequately prepared pleadings. And parties' inability to make their cases will lead to decisions based on false premises.

As the NPRM notes, Section 208(b) of the Communications Act, 47 U.S.C. § 208(b), requires the Commission to resolve most formal complaints within 12 months, 15 if the facts are complex. Section 208(b) does not, however, support restrictions on the procedural rights of the parties in such

proceedings. As the NPRM correctly observes, Section 208(b) was enacted after the Commission adopted its present procedural rules governing complaints. Neither the statute itself nor its legislative history evinces any dissatisfaction with these procedural rules.

Rather, Congress was unhappy with the Commission's pace in resolving complaints once the cases had been submitted for decision. Senator Inouye, who added Section 208(b) to the 1988 FCC authorization bill, appended to the Senate Report a supplemental statement about the Section. He gave two reasons why the time limits were necessary, the first that "the FCC often fails to reach a decision completing a tariff investigation in a reasonable amount of time." 1988 U.S. Code Cong. and Adm. News, p. 4111. The Commission cannot now reasonably employ Congress' unhappiness with the Commission's own pace as the basis for restricting the procedural rights of parties in complaint proceedings.

Many of the proposed restrictions, moreover, will in fact slow the Commission's pace in reaching proper decisions. If the parties lack time adequately to research legal issues, for example, the Commission must conduct that research itself, or risk making its decisions on faulty legal grounds. If the parties lack sufficient time to discover all the relevant facts, the Commission will have to investigate those facts itself, or to decide without all the facts. If the parties must prepare their papers without carefully thinking through their positions,

the Commission will have to decide matters that need not have been decided.

Senator Inouye specifically concluded that Section 208(b)'s time limits would give the Commission enough time to avoid such results: "This amount of time should avoid constraining the FCC to such a degree that it is forced to issue a rushed, and possibly improper, decision." Id. at 4112. If the Commission now believes that Senator Inouye was mistaken, it should return to Congress and ask that the time limits be increased. It should not begin rushing into precisely the improper decision-making that Congress sought to avoid.

B. THE NPRM's SPECIFIC PROPOSALS.

The foregoing general considerations should be applied to all proposals being considered in this rulemaking proceeding. In addition, the following comments are offered on the specific proposals made in the NPRM.

1. Time for Filing Answers to Complaints.

The NPRM proposes to reduce from 30 days to 20 the time in which carriers must file answers to complaints. In this reduced time, carriers will also be required to file most motions concerning disposition of complaints. In effect, the Commission subtracts these ten days from the carriers' already limited time, and adds them to its own already substantial time. It is hard to believe that the additional ten days for the Commission will make much difference in the quality of the

decisions. The ten days lost to the carriers will, on the other hand, create wholly unreasonable pressure on the carriers to produce their answers and motions without adequate preparation.

Often when a carrier receives a complaint, the complaint is unanticipated. The carrier's attorneys must investigate the facts before they know how to answer the complaint. Once they have investigated the facts, they must conduct legal research, draft the answer, circulate the draft to the carrier's personnel, obtain comments, finalize the draft and file it with the Commission. Twenty days is not enough time in which to do these things properly. Not only that, but the NPRM would require the attorneys simultaneously to draft dispositive motions, cutting further into this unreasonably limited time.

Although, as the NPRM points out, the Federal Rules of Civil Procedure allow only 20 days for answers, the analogy to those rules is flawed. Complaints and answers in federal civil procedure serve only purposes of notice. They may be freely amended at any time in the proceedings. In FCC practice, complaints and answers serve substantive purposes, often providing the principal bases for the Commission's decisions. Free amendment is not part of FCC practice.

2. New Rules Governing Briefs.

The NPRM proposes two new rules concerning briefs called for by the staff. First, time limits are proposed. Briefs in cases where no discovery has been conducted must be filed within 15 days of the staff's order, and where discovery

has been conducted, they must be filed within 20 days. Second, page limitations are proposed. Where no discovery has been conducted the limit would be 25 pages, and where discovery has been conducted, 35 pages. Reply briefs are permitted only where discovery was conducted, are due within ten days of the principal briefs and are limited to 20 pages.

Each of these proposals is accompanied by the qualification that the staff may specify different limits. Perhaps this qualification should alleviate concerns about the proposed rules. Nevertheless, enshrining these limits as rules will contain at least a suggestion that they are benchmarks from which the staff will not ordinarily depart. If the proposed limits are not such benchmarks, it is not clear why they are being proposed as rules at all. The staff must call for the filing of briefs anyway; it can continue to set time and page limits at that point, according the needs of each case.

If the proposed limits are intended to be standard benchmarks, in complex cases they will be woefully inadequate. The difficult and multifaceted issues involved in such cases simply cannot be addressed within 20 days or inside 35 pages. If the Commission were to insist upon such limits in complex cases, the briefs cannot provide any reasonable assistance to the Commission in a just adjudication of the case.

3. Replies.

The NPRM proposes to eliminate the right of reply in most instances, including replies to answers and replies to

briefs where no discovery has been conducted. The rationale cited by the NPRM for this action is that the right of reply is sometimes abused. Parties filing replies sometimes use them to supply new material that should have been included in the original pleadings or merely to reargue matters already addressed in the earlier pleadings. These are, unfortunately, all too common failings of replies. But the Commission makes a serious mistake if, because replies are sometimes improperly used, it throws out the baby with the bathwater.

In their proper form, replies serve a necessary purpose. A proper reply addresses factual and legal arguments made by the responding party, and shows how those arguments do not support the responding party's proposed resolution. This is not a function that can be performed in an initial pleading. Yet the Commission's consideration of these points can be essential to just adjudication of the case. The true duty of replies, moreover, is most clearly seen when they are not permitted. When responding parties know that replies are not permitted, those parties can and do take greater liberties with the facts and law. Since those liberties cannot be addressed in a reply, the Commission is left to decide the case based on a flawed record.

The Commission can address abuses of the right of reply without eliminating the right itself. The Commission can adopt a rule that if a reply consists substantially of matter that was or should have been presented in the original pleading,

the entire reply will not be considered. Such a rule will go a long way toward eliminating abuses. Parties with legitimate reply matter will not want to run a risk that this matter will be disregarded because of the presence of improper matter. Parties with no legitimate reply matter will be encouraged by such a rule not to file a reply at all.

4. Discovery.

In general, the NPRM's proposals concerning discovery are good ones. The Commission is reasonable to expect discovery to be initiated within 20 days of the date answers are due. The Commission should, however, make it clear that this deadline covers only initiation of discovery. Follow-up discovery should still be permitted after discovery is initiated. Follow-up discovery is necessary when, as often happens, respondents provide only partial answers, or provide previously unknown information that shows a need for additional questions.

The right of discovery should not be eliminated or restricted. Discovery has become an essential element in adjudication of common carrier complaints. Carriers are no longer required to file tariffs or data supporting those tariffs. Without discovery, customers are almost completely in the dark. They are ignorant of the facts necessary to know whether a carrier's rates and practices are just and reasonable, or unjustly discriminatory. Yet the Commission depends upon customer complaints to ensure compliance with the Communications Act. The Commission rarely initiates its own investigations any

more. Customers' access to information about the carriers thus is essential if the Act is to be enforced.

The Commission is well within its discretion to bifurcate, as a matter of course, complaint proceedings into liability and damages phases. Such bifurcation should permit disposition of liability questions more rapidly.

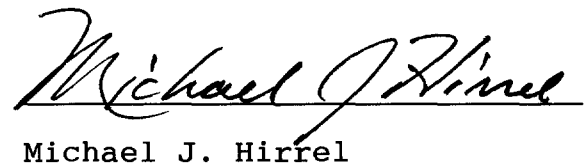
The NPRM's proposals concerning confidential, proprietary data will also be positive steps. Where, however, two versions of briefs must be filed--one with references to such data, and one without--the Commission should allow an extra five days for submission of the redacted versions. Deleting confidential data from the briefs will be a time consuming task. Without some additional time, it will be a task performed in the final, critical days of brief preparation, when parties should be focusing on the substance of their briefs. The task will not assist resolution of the case, because the Commission will rely on the unedited versions. Parties should not be diverted at this critical time for such a nonessential task. Nor will an extra five days for filing the redacted versions delay resolution of the case, again because the Commission will use the unredacted versions.

Finally, the NPRM proposes a rule under which an objection to an interrogatory based on relevance would be deemed an admission. This proposal is well-intentioned, but will prove impossible to administer. Interrogatories are phrased as questions. They are often amorphous questions. Imprecise

phrasing is usually the root cause of relevance objections. Deeming the objections to be admissions will lead to intractable problems determining precisely what was admitted.

Respectfully submitted,

MICHAEL J. HIRREL



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